HIGH COURT OF CHHATTISGARH, BILASPUR

Division Bench: Hon'ble Shri Justice L.C. Bhadoo &
Hon'ble Shri Justice Sunil Kumar Sinha, JJ.

Criminal Appeal No. 47 of 2003

Shaturghan & Another

Versus

State of Chhattisgarh

JUDGMENT

Judgment for consideration

Sd/-
Sunil Kumar Sinha
Judge

Hon'ble Shri Justice L.C. Bhadoo, J

Sd/-
L.C. Bhadoo
Judge

Post for Judgment: /10/2007

Sd/-
Sunil Kumar Sinha
Judge

(29) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 47 of 2003

APPELLANT (Accused)	1	Shaturghan, aged 22 yrs., s/o Chintaram Dhimar, r/o village Saddu, P.S. Pandri, Raipur, C.G.
	2	Garibdas, aged 19 yrs., s/o Ramdas Manikpuri, r/o village Saddu, P.S. Pandri, Raipur, C.G.
		Versus
RESPONDENT (Prosecution)		State of Chhattisgarh, through the S.H.O., P.S. Pandri, Raipur, C.G.

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri Bhishma Kinger, counsel for the appellants.

Shri Ashish Shukla, Govt. Advocate for the State/ respondent.

(DIVISION BENCH)

HON'BLE SHRI L.C. BHADOO &
HON'BLE SHRI SUNIL KUMAR SINHA, JJ.

JUDGMENT
(8.10.2007)

Following judgment of the Court was delivered by

Sunil Kumar Sinha, J.

(1) Being aggrieved with the judgment of conviction and order of sentence dated 29.11.2002 passed by the 9th Additional Sessions Judge (FTC), Raipur in Sessions Trial No. 21/2001, whereby, the appellants have been convicted under Section 302 read with Section 34 of I.P.C. and sentenced to undergo imprisonment for life, the appellants have preferred this appeal.

(2) The facts of the case, in brief, are that on 7.8.2000 at about 6.00 p.m., Shankar (a boy aged about 13 years, since deceased) was present in

his shop along with is brother Meghnath (PW-4). At that time, the appellants came there and they asked Meghnath to accompany them to take some refreshment. Meghnath denied, on this, they said Shankar to accompany them, who agreed and went along with the appellants. When Shankar did not return back in night, his father Bisau (PW-1) and brother Sewaram (PW-2) started search, they inquired from the appellants, who told them that after taking Shankar with them, they had left his company on the road near Lobhi Hotel andthey had gone to see cinema. Thereafter, Sewaram (PW-2) lodged a report of absconsion in the police station on 8.8.2000. During the course of investigation, shirt of the deceased was found near middle school of the village. There was a letter in the pocket of shirt, in which a ransom of Rs.70,000/- was demanded. On this, *Dehati Nalishi* Ex.-P/22 was recorded, based on which, a First Information Report Ex.-P/22-A was registered under Section 364/34 I.P.C. In further investigation, on 11.8.2000, the accused/appellants were taken into custody and their memorandums under Section 27 of the Evidence Act were recorded, in which they made statements regarding discovery of the dead body and other belongings of the deceased. They disclosed that the dead body of the deceased was kept by them in a gutter of Filter Plant. Apart from that appellant Satrughan stated that one *kada* & chain of the deceased has been thrown into Budha tank, appellant Garibdas stated that pant of the deceased has been kept in his house and all these articles can be recovered from the places indicated by them. The memorandum of appellant Satrughan is Ex.-P/4 and memorandum of appellant Garibdas is Ex.-P/5. In pursuance of the said information, the police party went to the Filter Plant and dead body was taken out from the gutter and *Panchnama* to this effect was prepared vide Ex.-P/6. Another *Panchnama* regarding taking out of the body from the gutter was prepared vide Ex.-P/7. The third *Panchnama* regarding recovery of the dead body was prepared vide Ex.-P/8. In pursuance of the said memorandum a full pant was seized from the possession of appellant Garibdas. One pair of plastic *Chhappal* was seized from the possession of

appellant Satrughan under Ex.-P/11. One pair of plastic *Chhappel* was seized from the possession of appellant Garibdas under Ex.-P/12. Some cloths were seized from the possession of Satrughan under Ex.-P/13. Some cloths were also seized from the possession of appellant Garibdas under Ex.-P/14. In further investigation, on 12.8.2000 specimen hand writing of Garibdas was taken under Ex.-P/15 and a note-book of subject Geography allegedly belonging to Garibdas was seized under Ex.-P/16. Sealed packet of some articles, which were brought from the hospital, were seized under Ex.-P/20-A.

(3) The dead body of the deceased was sent for post-mortem examination to Mekahara, Raipur, where Doctor Ullas Gonnade (PW-10) conducted the post-mortem and prepared his report under Ex.-P/21. According to the post-mortem report, the body was in advanced stage of putrefaction, maggots were present around left shoulder, arm, neck and upper portion of chest in size of 11 mm, tongue was slightly protruded out from mouth, upper portion of the body was more decomposed in comparison of lower portion. On the internal examination, it was found that the brain material was liquefied. The tissues of the neck of the deceased were highly decomposed. Thyroid bones etc. were intact but the other internal organs were decomposed. According to him, no definite opinion could be given regarding cause and manner of death because the body was in advanced stage of putrefaction . Hence visera was preserved.

(4) The seized articles were sent for chemical examination to F.S.L. Raipur under Ex.-P/24. Visera was also sent for further examination under Ex.-P/25. The letter seized from the pocket of shirt of the deceased and the specimen hand writing of appellant Garibdas and his note-book were also sent for expert examination under Ex.-P/26. Cartilage tissue was also sent for examination and opinion to Medico Legal Institute, Gandhi Medical College, Bhopal under Ex.-P/27. Visera report was received under Ex.-P/28, in which, no poisonous substance was found therein. Report from Medico Legal Institute was received under Ex.-P/29,

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according to which, a possibility of death by throttling cannot be fully ruled out in this case. A report Ex.-P/31 was also received from F.S.L., Raipur. According to this report, blood stains were not found on the cloths except the shirt of appellant Garibdas and underwear of deceased Shankar. The blood stains were also not found on the full pant of the deceased said to have been recovered on the memorandum of appellant Garibdas. Hand writing expert report about writing of letter of ransom (Ex.-P/33) was also received along with opinion from State Examiner of Questioned Documents Government of Madhya Pradesh, Jehangirabad, Bhopal, who opined that the person who wrote the red enclosed writings stamped and marked B1 to B6, B1/1 to B6/1 and C1 to C6 also wrote the red enclosed writings similarly stamped and marked Q1 and Q1/1.

(5) After completion of usual investigation, the charge-sheet was filed in the Court of Judicial Magistrate First Class, Raipur, who in turn committed the case to the Sessions Judge, Raipur, from where it was received on transfer by the 9th Additional Sessions Judge (FTC), Raipur, who conducted the trial and convicted and sentenced the accused/appellants as aforementioned.

(6) Admittedly, there is not ocular evidence in this case and the conviction of the appellants is based upon circumstantial evidence and the following two circumstances have been held to be proved by the trial Court.

i) The deceased was last seen in the company of the appellants on 7.8.2000 &

ii) The dead body of the deceased was discovered and recovered at the instance and on the memorandums/ statements given by the appellants.

(7) Learned counsel for the appellants argued that the motive of crime has not been proved in this case. He also argued that none of the circumstances have been established so as to come to irresistible conclusion that the appellants were the author of the crime in question.

(8) On the other hand learned counsel for the State opposed these arguments and supported the judgment of conviction and order sentence passed by the trial Court.

(9) We have heard Shri Bhishma Kinger, learned counsel for the appellants as also Shri Ashish Shukla, learned Govt. Advocate for the State.

(10) So far as motive for commission of crime in question is concerned, the case of the prosecution is that the deceased was kidnapped for receiving ransom of Rs.70,000/-, for which, a letter Ex.-P/33 was written by appellant Garibdas, but, later on he was murdered. According to the prosecution, the said letter was there in the pocket of the shirt of the deceased, which was found lying near the school of the village. It was firstly found by one Niranjan, who brought it and handed over it to sister-in-law (*Bhabhi*) of the deceased namely Hemlata (PW-3). Hemlata gave this shirt to one Lakhan and thereafter the said shirt was seized by the Investigating Officer S.S. Shukla (PW-12) from the possession of Sewaram (PW-2) under Ex.-P/1. Even if we do not dispute the seizure of the letter under Ex.-P/1, the question would be as to whether, in fact, the said shirt was found in abandoned condition near the school and whether there was a letter in the pocket of the shirt? This chain of evidence is missing in this case as neither Niranjan has been examined by the prosecution who is said to have firstly discovered the shirt and the letter, nor Lakhan has been examined, to whom, as it is stated, the shirt was handed over by Hemlata (PW-3). In such situation, it cannot be held to be proved that the shirt was found near the school in the village and in fact, there was a letter (Ex.-P/33) in the pocket of the shirt. In such situation, a possibility of such document being planted cannot be fully ruled out in this case. The other important circumstance is that the hand writing expert has not been examined, and the opinion submitted by him was not proved, therefore, it was not proved by the prosecution that the letter (Ex.-P/33) was written by appellant Garibdas as has been alleged

by them. The other circumstance, which appears to be more appealing to us is that it comes in the evidence of PW-4, Meghnath, brother of the deceased, that when the accused persons had came to their shop, they had firstly asked him to accompany them for taking refreshment and when he had denied, then accused Satrughan asked his brother Shankar to accompany them, on which, he agreed. This shows that in fact, the accused persons were not inclined to take the deceased with them and when Meghnath refused to go with them, then only, they said the deceased to accompany them, that means, they had not a definite plan to take the deceased with them and they wanted any body, who may accompany them for taking refreshment. This conduct of the appellants appears to be natural and general. Had there been any motive to kill the deceased, they would have straightforward tried for taking the deceased with them and not that firstly they would have asked the brother of the deceased and on his refusal, they would have asked the deceased.

(11) Motive is a definite factor, which always operates against a particular aim. From the above evidence on record, it does not appear that the appellants were having a definite motive for killing the deceased and for that they had taken him with them. In a case solely depending upon circumstantial evidence, the motive becomes important, but if circumstantial evidence proves beyond doubt that it was the accused and none else who killed the deceased, failure to prove motive is of no consequence. In the present case, the prosecution has utterly failed to prove the motive and we hold it accordingly. Now we shall deal with the circumstantial evidence relied on by the trial Court.

First Circumstance:

(12.1) For proving the first circumstance i.e. the circumstance of last seen together, the prosecution has relied on the evidence of PW-4, Meghnath, PW-6, Smt. Sunita Jha and PW-7, Ghanshyam Patel.

(12.2) So far as PW-4, Meghnath is concerned, he deposed that on the fateful day, he was in shop along with his brother. At that time, accused persons had come to the shop, they had firstly asked him to accompany them and on his refusal, they asked the deceased Shankar to accompany, on which, Shankar went along with them from the shop. PW-6, Smt. Sunita Jha deposed vide Para-2 of her evidence that at about 8.00 p.m. on the fateful night, she was returning from *Dal* Mill, where she was working, and when she reached near liquor *Bhatti*, she saw both the appellants and Shankar in front of *Bhatti.* They all were standing. Shankar was holding a bicycle, she had asked Shankar to go to house, on which, Shankar replied that he will come afterward, thereafter she went to her house. PW-7, Ghanshyam Patel is also a villager. He deposed that on the fateful night i.e. 7.8.2000, he had gone to liquor *Bhatti* for purchasing liquor, where he saw that both the accused persons were taking refreshment near the said *Bhatti* . Shankar was also present there and he was also taking refreshment. Since they all were known to each other, Satrughan had asked him and his friend Budharu to take refreshment. Thereafter they returned back to their houses leaving Shankar and accused persons at the place they were taking refreshment. This is the only evidence against the accused persons regarding last seen together. Admittedly, *Daru Bhatti* and the hotel near the *Bhatti* are common places, where many people visit for their needs. It has only come in the evidence that the accused persons and the deceased were taking refreshment near *Daru Bhatti* but it nowhere comes that thereafter the deceased was taken by the accused persons or he had gone with the accused persons toward any place. The prosecution has not brought on record as to what happened after the deceased had taken refreshment with the accused persons.

(12.3) About last seen, the law is well settled that the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the

accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. In fact, the time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of evidence. (***Please see- 2007 {4} SBR 321, State of Goa -Vs- Sanjay Thakran & Anr.***)

(12.4) In the present case, admittedly, the deceased was seen in the company of the appellants at about 7.30 – 8.00 p.m. on 7.8.2000 and the dead body of the deceased was detected on 11.8.2000 and there was a long time gap in between these, therefore, lastly seeing the deceased along with accused persons on 7.8.2000 would hardly be an incriminating circumstance against the accused persons for taking it into consideration for finding their guilt. Therefore, even if it is established that the deceased was lastly seen in the company of accused persons on 7.8.2000, looking to the time gap, a possibility of any other person being with the deceased cannot be completely ruled out in this case.

Second Circumstance:

(13.1) The second circumstance on which the trial Court has relied is the memorandums/statements given by the accused persons on 11.8.2000 and recovery of the dead body at the instance thereof.

(13.2) So far as Section 27 of the Evidence Act is concerned, the essential factor is that the information given by accused may lead to discovery of the fact which is the direct outcome of such information and only that portion of the information given, which is distinctly connected with the discovery of the fact, can be received in evidence, and the discovery of the fact must relate to the commission of the offence. Therefore, the most essential condition under section 27 of the Evidence Act is the discovery of a relevant fact in consequence of the information given by a person accused of an offence. The expression "fact

discovered" includes not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to its existence. But it is also well settled that a fact already discovered from other sources cannot be discovered again even if relevant information is received from the accused.

(13.3) In the present case, the memorandums have been proved by the Investigating Officer, S.S. Shukla (PW-12) and independent witness Ishwari Prasad (PW-5). The memorandums have been marked as Ex.-P/4 & P/5. On the first cite, the contents of these two documents would show that in fact, the information regarding concealing of the dead body in a gutter of Filter Plant has been given by the accused persons, which has been proved by the evidence of PW-5. But it comes in the cross-examination of PW-5, vide Para-7, that before the memorandum/ statements were recorded, he was called by the police to police station Pandri by one person from the police station, who had come to village and had told that the information regarding Shankar has been received and they are called in police station. He deposed that on receiving such message from the police station, he had gone to the police station along with Govind, Baharu and Tulsiram and other persons has also accompanied them but he cannot tell their names. Vide Para-9 of his cross-examination, he further deposed that when he reached to the police station, the accused persons were brought from some other place by the police and thereafter they were asked. He has signed the documents in the police station. On this evidence of the witness, it clearly appears that only after knowing about the whereabouts of Shankar, Pandri police has sent one person from the police station to call this witness and other persons and this fact was disclosed by that policeman to the villagers, which has been deposed by this witness in following manner:

> ".....पुलिस का एक आदमी गांव पहुंचा था तथा बताया था कि शंकर का पता चल गया है तथा थाने में बुलाये है ।....."

This clearly shows that before calling this witness in the police station and before recording the memorandum u/s 27, the police had information about the dead body and when this person reached to the police station, the formal statements were recorded, which were mere formalities and there was no question of discovery of a fact by the said statements. Therefore, the memorandum of the accused persons, vide Ex.-P/4 & P/5, does not lead to discovery or exclusive information regarding hiding of the dead body at a particular place as such information was already with the police and after getting such information, the police had called the witness from the village, therefore, this circumstance is not established against the accused/appellants. When the discoveries from the accused/appellants are not established, seizure made in consequence of the so called discoveries would be of no use to the prosecution and in fact, the prosecution has failed to establish that the dead body of the deceased was recovered at the instance of the accused persons.

(14) It is settled principle of law that when the prosecution case is based upon the circumstantial evidence, such evidence must satisfy the following tests:

(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

(Please see- Sanjay Thakran's case [supra])

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(15) In the present case, the prosecution has failed to establish the above circumstances against the accused persons so as to hold them guilty of offence punishable under Section 302 read with Section 34 of I.P.C. The trial Court committed error of law while convicting the accused/appellants on the basis of such evidence.

(16) In the result, the appeal is allowed. The conviction and sentence awarded to the appellants are set aside. They are acquitted of the charges framed against them. It is stated that the appellants are in jail. They be set at liberty, if not required in any other case.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Sunil Kumar Sinha
Judge

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